

## **Introduction**

On January 1, 2000, California's Whistleblower Protection Act (WPA) (Government Code sections 8547 *et seq.*) was significantly amended. The Legislature amended this law to strengthen protections for state civil service employees and applicants for state civil service employment who claim that they have been subjected to improper personnel actions because of whistleblowing activities. This Act, together with Government Code section 19683, provides significant protections to state employees and applicants for state employment who engage in whistleblowing activities. State employees and applicants for state employment who believe they have been subjected to improper personnel actions as a result of their whistleblowing activities may file an appeal with the State Personnel Board (SPB) concerning the improper personnel action. In addition, on January 1, 2002, the Legislature amended the "Reporting by Community College Employees of Improper Governmental Activities Act" (RCCEIGAA) (Education Code sections 87160 *et seq.*) to provide these same protections and appeal rights to community college employees and applicants for community college employment.

It is important to note that, while the SPB has jurisdiction over complaints of retaliation that a state or community college employee or applicant for state or community college employment has experienced as a result of engaging in whistleblowing activities, the SPB ordinarily will not investigate the underlying improper governmental activity itself. Instead, the California State Auditor has jurisdiction to investigate such matters.

The information provided below is descriptive of existing law and is intended to assist the reader in better understanding how the law is applied by the SPB. *The discussion of whistleblower appeals in this publication is not all-inclusive, nor is the information regulatory in nature.* Instead, on January 8, 2006, the SPB implemented regulations concerning the whistleblower retaliation complaint process. Those regulations are located at Title 2, California Code of Regulations, sections 56.1 through 56.8. In addition, the following two hotlines have been established:

**SPB's Whistleblower Hotline - (916) 653-1403**

**State Auditor's Whistleblower Hotline - (800) 952-5665**

Copies of pertinent statutes and regulations, as well as a Sample Whistleblower Retaliation Complaint, are also located on the SPB website.

## **Question No. 1**

### **What is "Whistleblowing"?**

Whistleblowing means either disclosing information that a state or community college employee, or applicant for state or community college employment, reasonably believes is evidence of an *improper governmental activity*, or refusing to obey an *illegal order or directive*

A disclosure is "protected" if it is a good faith communication that discloses or demonstrates an intent to disclose information that may indicate either (1) an improper governmental activity, or (2) any condition that may significantly threaten the health or safety of employees of the public if the disclosure or intention to disclose was made for the purpose of remedying that condition. An "improper governmental activity" is any activity that violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform a duty, or involves gross misconduct, incompetency, or inefficiency.

An "illegal order" is any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside their line of duty that would unreasonably threaten the health and safety of other employees or the public.

## **Question No. 2**

### **What constitutes an improper personnel action based on whistleblowing activities?**

State or community college employees may not directly or indirectly use or attempt to use their official authority or influence for purposes of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person who makes a protected disclosure under the WPA or the RCCEIGAA. Consequently, it is a prohibited personnel practice for an agency to subject any state or community college employee or applicant for state or community college employment to an improper personnel action if the action is threatened, proposed, or taken because of whistleblowing activities. State or community college employees who engage in retaliation for protected whistleblowing activity may be subject to disciplinary action as well as civil liability.

Examples of improper personnel actions based on whistleblowing activities include, but are not limited to, disciplinary actions, involuntary transfers, refusals to promote, denial of merit salary increases, and reassignment of duties.

### **Question No. 3**

#### **Who may file a whistleblower complaint?**

Any current state civil service or community college employee or applicant for state or community college employment who reasonably believes that he or she has been subjected to an improper personnel action, or who reasonably believes that he or she has been threatened with an improper personnel action, and that improper personnel action is based, at least in part, on the fact that the employee or applicant disclosed improper governmental activities or disclosed his or her refusal to obey an illegal order or directive.

In addition, state civil service or community college employees who have been dismissed from their employment may file a complaint with the SPB within 12 months of their dismissal, provided the dismissal was based, at least in part, on the former employee having participated in protected activities under the WPA. Similarly, applicants for state civil service or community college employment may file a complaint with the SPB within 12 months of their denial of employment, provided the denial of employment was based, at least in part, on the applicant having participated in protected activities under the WPA.

The SPB does NOT, however, have jurisdiction over whistleblower retaliation complaints filed by employees of, or applicants for employment with, the University of California, California State University, local school districts, or local government agencies.

### **Question No. 4**

#### **Against whom can a whistleblower complaint be filed?**

Any appointing power, community college district (including individual campuses) or state or community college employee who directly or indirectly uses or attempts to use his or her official authority or influence for purposes of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person who makes a protected disclosure under the Whistleblower Protection Act.

### **Question No. 5**

#### **What are the time limits for filing a whistleblower complaint with the SPB?**

The complaint must be filed with the SPB within 12 months of the most recent act or reprisal complained about.

### **Question No. 6**

#### **What remedies may the complaining state employee or applicant receive?**

If it is determined that a state or community college employee or applicant for state or community college employment has been retaliated against for having made a protected disclosure, the Board may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, and the expungement of any adverse records of the state employee or applicant for state employment. The employee or applicant may also request that disciplinary action be taken against any state employee who retaliated against him or her for having made a protected disclosure.

### **Question No. 7**

#### **Who must prove what in whistleblower cases?**

The complaining employee or applicant has the burden of proving by a *preponderance of the evidence* that whistleblowing was a contributing factor in the improper personnel action taken or threatened against him or her. The employee or applicant may demonstrate that whistleblowing was a contributing factor by showing that the official taking the action knew about the whistleblowing and that the action occurred within a time period such that a reasonable person would conclude that the whistleblowing was a contributing factor in the employment action.

If the employee or applicant meets this burden, the appointing power and any individually named state employees must demonstrate by *clear and convincing evidence* that the complained of action would have occurred even if the complaining employee or applicant had not engaged in whistleblowing. The clear and convincing standard of proof is a higher standard than the preponderance of the evidence standard that the employee must meet.

If the appointing power and individually named employees meet this burden, the complaining employee or applicant will be afforded an opportunity to establish that the asserted reasons for the complained of actions were merely a pretext for retaliation.

### **Question No. 8**

#### **What should be included in a complaint filed with the SPB?**

The complaint must be filed with the SPB's Appeals Division and must: (1) identify the facts that form the basis of the complaint, including, but not limited to: (a) the protected disclosure made by the employee or applicant; (b) the date the employee made the protected disclosure; (c) the person(s) to whom the

employee or applicant made the protected disclosure; (d) the improper employment action experienced or threatened as a result of the protected disclosure; (e) the date on which the improper employment action was threatened or actually occurred; (f) all information that the employee or applicant possesses that shows that the improper employment action occurred as a result of the employee's or applicant's whistleblowing activities; (2) include all non-privileged documents, records, declarations and other information in the employee's or applicant's possession that are relevant to the complaint, and/or a list of all such documents that the employee or applicant reasonably believes are in the appointing power's possession; (3) identify the appointing power as well as all state employees who are reasonably believed to have retaliated against the employee or applicant and, if disciplinary action is sought against any individual, specify the basis for such disciplinary action and the actual discipline to be imposed; (4) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the employee or applicant.; (5) specify the relief and/or remedies sought, including the disciplinary action, if any, requested against any individual alleged to have retaliated against the employee or applicant; and (6) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the employee or applicant to be true.

*Please refer to the provisions of Title 2, California Code of Regulations, section 56.1, for a more detailed description of whistleblower complaint filing requirements.*

### **Question No. 9**

#### **What will occur after the SPB receives the whistleblower complaint?**

The SPB will, within 10 working days of receipt of the complaint, notify the complaining party as to whether the complaint has been accepted or not. If the complaint is not accepted, the complaining party will be told why, and may be afforded an opportunity to file an amended complaint with the SPB. If the complaint is accepted, the parties will be notified of that fact and the complaint will be submitted for either investigation by the SPB's Executive Officer, or for an informal hearing before an SPB Administrative Law Judge (ALJ). The SPB, not the complaining party, will be responsible for serving a copy of the complaint, together with all accompanying documents, on each named respondent. (BUT, the complaining party must provide the SPB with a sufficient number of copies of the complaint to be served on each named respondent.)

In those cases where the Executive Officer investigates the complaint, the Executive Officer, or his or her designee, shall, pursuant to the provisions of Government Code section 18670 *et seq.*, have the authority to, among other

things, interview and/or depose witnesses, and subpoena and require the production of books or papers. After reviewing the information obtained during the investigation, the Executive Officer will issue a Notice of Findings concerning the complaint. The Notice of Findings will be issued within 60 working days of the SPB's acceptance of the complaint, and will indicate whether any of the allegations of retaliation are supported by substantial evidence and, if so, what the appropriate remedy is under the circumstances. The Notice of Findings will also indicate what disciplinary action, if any, is recommended against any individually named employee found to have violated the WPA.

In those cases where the complaint is assigned for an informal hearing before an SPB ALJ, the hearing will be conducted in accordance with the provisions of Government Code section 11445.10 *et seq.*, and the ALJ may require the production of documents and records, and may question witnesses regarding the allegations contained within the complaint. The ALJ may also, in his or her discretion, afford the parties an opportunity to cross-examine witnesses. After the informal hearing has concluded, the ALJ shall prepare a proposed Notice of Findings for review by the Executive Officer, who shall have the authority to adopt, modify or revoke the proposed Notice of Findings and prepare his or her own Notice of Findings based on the information presented during the course of the informal hearing. The final Notice of Findings will be issued within 60 working days of the SPB's acceptance of the complaint, and will indicate whether any of the allegations of retaliation are supported by substantial evidence and, if so, what the appropriate remedy is under the circumstances. The Notice of Findings will also indicate what disciplinary action, if any, is recommended against any individually named employee found to have violated the WPA.

### **Question No. 10**

#### **What Happens if the Executive Officer Concludes that Insufficient Evidence Exists to Support a Finding of Retaliation?**

In those instances where the Executive Officer concludes in the Notice of Findings that insufficient evidence has been presented to establish that the complaining party has been retaliated against for having engaged in protected activity under the WPA, the complaint will be dismissed by the Executive Officer. The complaining party will be deemed to have exhausted his or her administrative remedies, and may thereafter pursue whatever judicial remedies are available to him or her under the WPA.

### **Question No. 11**

#### **What Happens if the Executive Officer Concludes that Sufficient Evidence Exists to Support a Finding of Retaliation?**

In those instances where the Executive Officer concludes in the Notice of Findings that sufficient evidence has been presented to establish that the complaining party has been retaliated against for having engaged in protected activity under the WPA, the named respondents will be notified of their right to request an evidentiary hearing before an ALJ. If the SPB receives a timely request from one or more of the named respondents, an evidentiary hearing will be scheduled, usually within 60 days of the receipt of the hearing request. All parties to the complaint will thereafter be afforded an opportunity to conduct discovery pursuant to the provisions of Title 2, California Code of Regulations, section 57 *et seq.* If a timely request for an evidentiary hearing is not received by the SPB, the Notice of Findings becomes the five-member Board's (Board) final decision regarding the complaint.

### **Question No. 12**

#### **What happens if the Case is Scheduled for an Evidentiary Hearing Before an ALJ?**

An evidentiary hearing will be conducted by an ALJ assigned by the SPB. The hearing may last one or several days. The hearing will be conducted in accordance with SPB rules concerning the conduct of administrative hearings. Witnesses may be called to testify and subjected to cross-examination, and documentary evidence may be introduced.

The burdens of proof and production set forth in Question No. 7, above, are applicable to the evidentiary hearing before the ALJ. The complaining party may represent him or herself during the hearing, or may be represented by a legal representative of his or her choosing. In addition, the Executive Officer may elect to prosecute the complaint him or herself. In such situations, the complaining party may still elect to also be represented by him or herself, or by a legal representative of his or her choosing. In those cases where the Executive Officer elects to prosecute the complaint, the case will be assigned to hearing before an ALJ from the Office of Administrative Hearings, not an SPB ALJ.

Similarly, the appointing power and any individually named respondents may represent themselves during the hearing, or may be represented by a legal representative of their choosing. All parties to the complaint will be entitled to conduct discovery prior to the hearing in accordance with SPB rules, as set forth in Title 2, California Code of Regulations, sections 57 *et seq.*

After the hearing has concluded, the ALJ will, within 90 days after the case has been submitted, present a Proposed Decision for consideration by the Board. The Proposed Decision will specifically indicate whether any of the allegations of retaliation contained within the complaint are supported by the evidence and, if so, what the appropriate remedy is under the circumstances. The Proposed Decision will also indicate what disciplinary action, if any, is to be taken against any individually named employee found to have violated the WPA.

### **Question No. 12**

#### **What happens after the ALJ issues his or her Proposed Decision?**

The Board may adopt, modify, or reject the Proposed Decision. If the Board adopts the Proposed Decision, it becomes the Board's decision in the matter and the Board will order whatever remedy and/or disciplinary action that is set forth in the Proposed Decision.

If the Board modifies the Proposed Decision, it will specifically indicate those portions of the Proposed Decision, including the remedies and/or disciplinary action that it is modifying. The modified Proposed Decision then becomes the Board's decision in the matter.

If the Board rejects the Proposed Decision, it will notify the parties of that fact. The case will then be scheduled for a hearing before the Board itself.

### **Question No. 13**

#### **What happens if the appeal is scheduled for a hearing before the Board?**

Prior to the hearing, the parties will usually be given an opportunity to submit a written brief to the Board for its review. The hearing itself will usually last 30 minutes. Each side to the appeal will be given 15 minutes to present his or her case to the Board. As a general rule, the hearing will be based solely on the evidence presented during the hearing before the ALJ, and no new evidence or witness testimony will be permitted.

After the hearing has concluded, the Board will usually issue its Decision within 90 days of the hearing date. The Decision will specifically indicate whether any of the allegations of retaliation are supported by the evidence and, if so, what the appropriate remedy is under the circumstances. The Decision will also indicate what disciplinary action, if any, is to be taken against any individually named employee found to have violated the Whistleblower Protection Act.



#### **Question No. 14**

##### **What happens if one or more parties to the appeal is not satisfied with the Board's Decision?**

Any party to the appeal who disagrees with the Board's decision may file a Petition for Rehearing with the Board, in accordance with SPB rules. If the Petition for Rehearing is denied, the aggrieved party may file a Petition for Writ of Mandate in the Superior Court, challenging the Board's decision. *Note: It is not necessary to file a Petition for Rehearing with the SPB prior to seeking relief in the superior court.*

#### **Question No. 15**

##### **Where can I find more detailed information?**

More detailed information concerning the whistleblower complaint process can be found at Education Code sections 87160 - 87164, Government Code sections 8547 - 8547.12 and 19683, and Penal Code section 6129. You can also refer to the SPB's regulations, located at Title 2, California Code of Regulations, sections 56 - 56.8, and 57.1 - 57.4.

For your convenience, copies of all of the above-listed statutes and regulations are included at the end of this document.

#### **Question No. 16**

##### **Who can I contact at the SPB?**

Individuals can telephone the **SPB Whistleblower Hotline (916-653-0799)** to discuss the whistleblower complaint process with SPB staff. Please note that, while SPB staff cannot provide legal advice to any party concerning a whistleblower retaliation complaint, they can explain the complaint process to interested parties.

Whistleblower complaints should be submitted to the following address:

State Personnel Board  
801 Capital Mall  
Sacramento, CA 95814  
Attn: Appeals Division